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Filing date: **09/30/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91220327
Party	Defendant Day's Beverages, Inc.
Correspondence Address	ALEX R SLUZAS PAUL AND PAUL 1717 ARCH STREET, SUITE 3740 PHILADELPHIA, PA 19103 UNITED STATES info@paulandpaul.com, asluzas@paulandpau
Submission	Motion to Compel Discovery
Filer's Name	Alex R.sluzas
Filer's e-mail	info@paulandpaul.com,jperna@paulandpaul.com
Signature	/Alex R. Sluzas/
Date	09/30/2015
Attachments	Motion_to_compel_redacted.pdf(5431830 bytes )

TRADEMARK

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Serial No.: 86/337,103

Filed: July 15, 2014  
For: **CITY CLUB**  
Published: December 23, 2014  
Applicant: Day's Beverages, Inc.  
Atty. Doc. Nos.: 072-14; 3097

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3rd Generation Enterprises Co. Corp. :

v. :

Opposition No.: 91220327

Day's Beverages, Inc. :  
:

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**REDACTED VERSION**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Serial No.: 86/337,103

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3rd Generation Enterprises Co. Corp. :

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Opposition No.: 91220327

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**RESPONDENT'S COMBINED MOTION TO COMPEL DISCOVERY RESPONSES,  
REQUEST FOR SUSPENSION, AND BRIEF IN SUPPORT THEREOF**

Respondent Day's Beverages, Inc., hereinafter "Day's Beverages," by and through its undersigned attorney and pursuant to 37 C.F.R. 2.120, hereby requests an order compelling responses to Interrogatory 8(a), and Document Request 2 to the extent such responses have been withheld based on Opposer 3rd Generation Enterprises Co. Corp.'s ("3rd Generation") refusal to respond to Interrogatory 8(a), and in support thereof, sets forth as follows:

1. On April 24, 2015, Day's Beverages served Applicant's First Set of Requests for Production of Documents on 3rd Generation. On May 18, 2015, 3rd Generation served responses and produced documents responsive thereto. Copies of the requests and responses are appended as Exhibits A and B hereto.

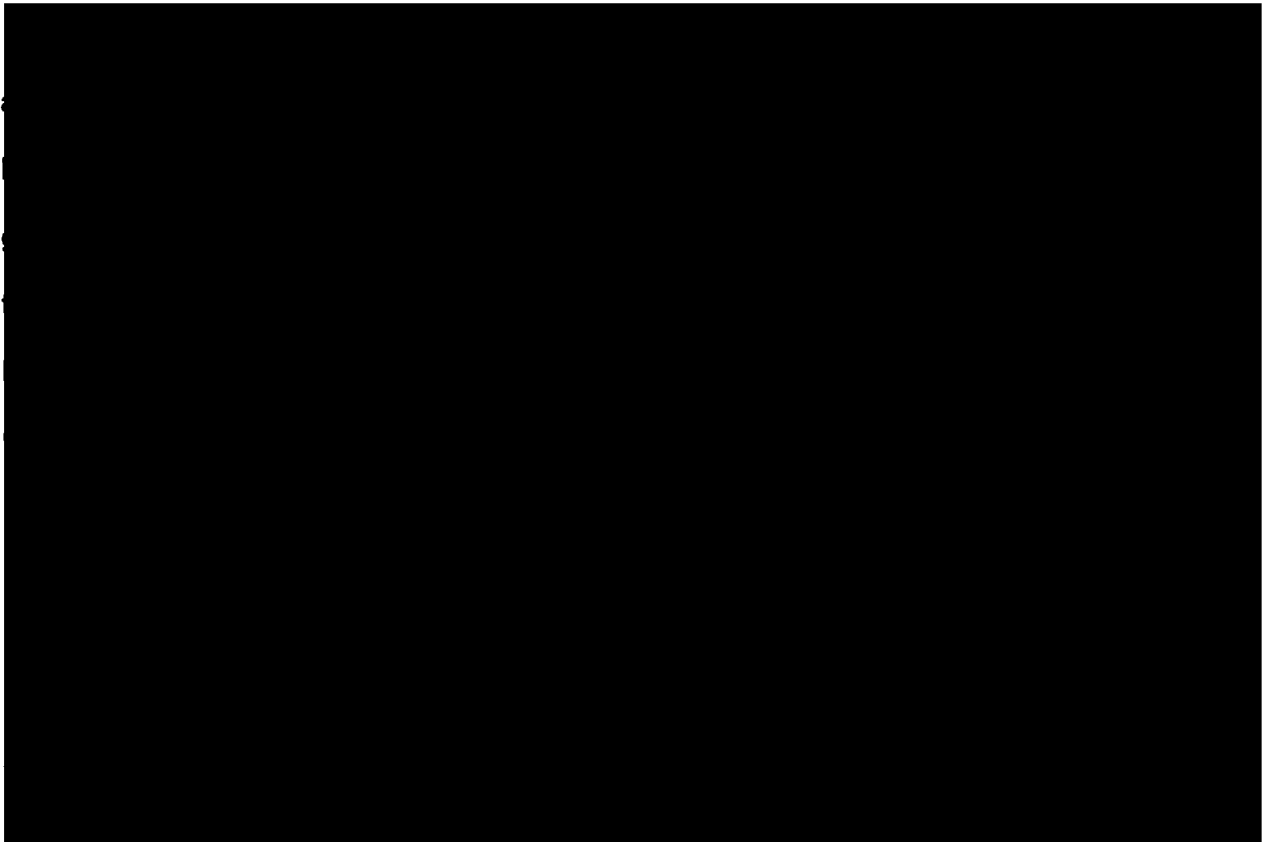
2. On June 5, 2015, Day's Beverages served Applicant's Revised First Set of Interrogatories on 3rd Generation. On July 10, 2015, 3rd Generation served responses. Copies of the requests and responses are appended as Exhibits C and D hereto.

3. In its response, 3rd Generation objected to Interrogatory 8(a) relating to the sales of TOP POP beverages, on the specific basis that the interrogatory was not relevant to the claims or defenses in this opposition.

4. On July 17, 2015, counsel for Day's Beverages wrote to counsel for 3rd Generation, explaining the relevance of the information requested by Interrogatory 8(a). A copy of counsel's letter of July 17, 2015, is appended hereto as Exhibit E.

5. On July 28, 2015, counsel for 3rd Generation responded to the letter of July 17, 2015. A copy of the response is appended hereto as Exhibit F.

6. On September 17, 2015, counsel for Day's Beverages took the deposition of 3rd Generation pursuant to Rule 30(b)(6) through Mrs. Marlen Bracho. A copy of excerpts from the confidential transcript of the deposition is appended as Exhibit G hereto.



[REDACTED]

8. The undersigned attorney made a good faith effort to resolve the dispute with counsel for 3rd Generation, by the above-referenced exchange of correspondence and by a subsequent telephone conference, concerning the issues presented in this motion, but the parties were unable to resolve their differences.

9. Day's Beverages respectfully requests that the Board issue an order compelling 3rd Generation to respond to Interrogatory 8(a) and produce documents relevant to its response as provided by Document Request 2.

10. Day's Beverages respectfully requests that the Board suspend proceedings with respect to all matters not germane to this motion.

WHEREFORE, Day's Beverages prays the Board issue an order which (1) requires 3rd Generation to provide full and complete responses, without objection, to Interrogatory 8(a) and produce documents relevant to its response as provided by Document Request 2, and (2) grants Day's Beverages any necessary discovery time to serve follow-up discovery following receipt of 3rd Generation's responses.

Respectfully submitted,

  
Alex R. Sluzas, Esq.

September 29, 2015

Paul & Paul  
Suite 3740  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 568-4900  
Attorneys for Applicant

Order No. 1706

### CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Compel is being served today by first class mail on the attorneys of record for Petitioner, Marc P. Misthal, Esq., and Jonathan Purow, Gottlieb, Rackman & Reisman, P.C., 270 Madison Ave, New York, NY 10016.

September 29, 2015

  
\_\_\_\_\_  
Alex R. Sluzas, Esq.

Paul & Paul  
Suite 3740  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 568-4900  
Attorneys for Applicant

# EXHIBIT A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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3rd Generation Enterprises Co. Corp.  
 Opposer

v.

Day's Beverages, Inc.,  
 Applicant

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Appln. No. 86337103

Opposition No. 91220327

**APPLICANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Applicant, Day's Beverages, Inc., pursuant to Patent and Trademark Office Rule 2.120 and Rule 34 of the Federal Rules of Civil Procedure, demands that Opposer, 3rd Generation Enterprises Co. Corp., produce within 30 days from the date of this request the following specified documents or physical things, or exact copies thereof, for inspection and copying, and that the same be produced for inspection at the offices of Applicant's attorney, Alex R. Sluzas, PAUL & PAUL, 1717 Arch Street, Suite 3740, Philadelphia, Pennsylvania, 19103.

The definitions provided in Applicant's First Interrogatories to Opposer, served concurrently herewith, are hereby incorporated in this request. It is particularly noted that these document requests are continuing in nature, such that any additional documents that Opposer acquires, or which become known to Opposer, shall be furnished reasonably promptly after such documents are acquired or become known.

**DOCUMENT REQUESTS**

1. All documents or other physical evidence requested to be identified by Opposer in its response to Applicant's First Set of Interrogatories to Opposer, served concurrently herewith.



2. All documents which reflect or contain any information set forth in, or which were used in the preparation of: Opposer's Notice of Opposition; Opposer's responses to Applicant's First Set of Interrogatories to Opposer served concurrently herewith; and any Interrogatories or Document Requests propounded by Opposer in this action.

3. All documents that Opposer may submit as evidence in this action.

4. A sample of each and every advertisement, promotion, catalog, price list, customer list, letter, brochure, bulletin, hand bill, flyer, webpage, Facebook posting, and packaging, and soda can, in the possession of Opposer that includes the term "CITY CLUB", alone, or in combination with other terms.

5. All documents which contain reports, factual observations, or opinions of experts who have been consulted by Opposer in connection with this opposition and/or may be called as witnesses during the testimony period of this cause of action.

6. All written materials of any kind that were provided to any expert whom Opposer intends to call as a witness during the testimony period of this cause of action and/or who has been consulted in connection with this opposition.

**DAY'S BEVERAGES, INC.**

April 24, 2015

BY:   
Alex R. Sluzas, Esq.

PAUL & PAUL  
1717 Arch Street  
Suite 3740  
Philadelphia, PA 19103  
(215) 568-4900  
ATTORNEYS FOR APPLICANT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

3rd Generation Enterprises Co. Corp.  
Opposer

v.

Day's Beverages, Inc.,  
Applicant

Appln. No. 86337103

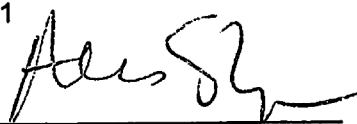
Opposition No. 91220327

**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below true copies of the foregoing  
**APPLICANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** and  
**APPLICANT'S FIRST SET OF INTERROGATORIES TO OPPOSER** were served by first  
class mail on Opposer, by attorney, as follows:

Marc P. Misthal, Esq.  
Jonathan M. Purow, Esq.  
Gottlieb, Rackman & Reisman  
270 Madison Ave., 8th Floor  
New York, NY 10016-0601

April 24, 2015

  
\_\_\_\_\_  
Alex R. Sluzas, Esq.

# **EXHIBIT B**

**REDACTED**

# EXHIBIT C

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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3rd Generation Enterprises Co. Corp.  
Opposer

v.

Day's Beverages, Inc.,  
Applicant

---

Appln. No. 86337103

Opposition No. 91220327

**APPLICANT'S REVISED FIRST SET OF INTERROGATORIES TO OPPOSER**

Applicant, Day's Beverages, Inc. ("Day's"), hereby propounds the following interrogatories to Opposer, 3rd Generation Enterprises Co. Corp. ("3rd Generation"), in accordance with Rule 2.120 of the Trademark Rules of Practice and Rule 33 of the Federal Rules of Civil Procedure, and requests that they be answered fully and under oath and in writing by Opposer within 30 days of service of these interrogatories.

These interrogatories have been revised in response to 3rd Generation's objection that the originally served interrogatories exceeded the 75 permitted under the rules, and in response to the explanation of counsel for 3rd Generation of the manner in which 3rd Generation calculated the number of interrogatories, including subparts.

**DEFINITIONS AND GENERAL INSTRUCTIONS**

1. "Opposer" shall be construed as including 3rd Generation Enterprises Co. Corp. and companies and corporations owned or controlled by Opposer and Opposer's predecessors, and persons, companies and corporations that own or control Opposer, and interrogatories using the term Opposer should be answered in conformance with such construction.

2. "Person" shall include natural persons and corporations, partnerships, associations, joint ventures and any other kind of entity.

3. "Document" shall mean any written, recorded, transcribed, printed, punched, taped, filmed, videotaped, or other graphic matter of any kind whatsoever, regardless of the form in which it is stored, however produced or reproduced, whether a device is necessary to render it in readable form or not, whether sent or received, however produced or reproduced, which embodies any handwritten, typed, printed, oral and/or visual communications or representations, including without limitation but not limited to any and all memoranda, reports, notes, correspondence, transcripts, letters, envelopes, diaries, telegrams, cables, telexes, files, telecopies, marginal notations, statements, summaries, opinions, contracts, modifications of contracts, books, appointment books, calendars, records, receipts, articles, circulars, bulletins, bills, invoices, requisitions, authorizations, change orders, requests for payment, checks, check stubs, bank statements, confirmations, account statements, messages, telephone messages, agreements, modifications of agreements, ledgers, negotiable or non-negotiable instruments, journals, worksheets, minutes, photographs, sketches, drawings, newspapers, magazines, press releases, projections, papers, magnetic tape, record or wire recordings, pleadings, notices, excerpts, clippings, sworn or unsworn testimony, interviews or examinations, studies, analyses, comparisons, surveys, financial statements, calculations, charts, diagrams, transmittals, schedules, pamphlets, indices, maps, web pages, tweets, social media postings, blog postings, Facebook postings, licenses, periodicals, hand bills, flyers, advertisements, promotions, lists, directories and database printouts, whether copies or originals.

4. "Identify" shall mean:

(a) In the case of a person, to state to the extent known:

- (i) name; (ii) last known address; (iii) employer or business affiliation;
- (iv) occupation and business position held; and (v) address of employer.

(b) In the case of a company, firm, corporation or association, to state to the extent known:

(i) name; (ii) address; and (iii) identity of persons having knowledge of the matter inquired about.

(c) In the case of a document or communication, to state to the extent known:

(i) the author of the document or communication;

(ii) its title or description of the general nature of its subject matter;

(iii) the identity of the recipients of the originals or copies, if any;

(iv) its dates of preparation;

(v) its dates and manner of distribution and publication, if any;

(vi) its present location and custodian; and

(vii) any privileges claimed, describing the specific basis therefor.

(d) In the case of property, real or personal, state to the extent known:

(i) the location of the property; (ii) the legal description of the property; and (iii) the purpose or use of the property.

5. "Mark" shall mean the mark "CITY CLUB" which is the subject of U.S. Application No. 86337103.

6. The terms "and" and "or" shall be construed either conjunctively or disjunctively so as to include within the scope of the particular interrogatory or request for documents matters that otherwise would be outside the scope.

7. Terms used in the singular shall be deemed to include the plural and terms used in the masculine shall be deemed to include the feminine.

8. These interrogatories and accompanying request for documents seek responses as of the date of the execution of same, but shall be deemed to be continuing so that any additional information relating in any way to these interrogatories and

document requests which Opposer acquires, or which becomes known to Opposer, shall be furnished reasonably promptly after such information is acquired or becomes known.

9. If objection is taken to any interrogatory or request for documents, the grounds for the objection and categories of information and documents to which the objection applies should be stated with specificity, and the interrogatory should be answered insofar as it is not deemed objectionable.

10. If an interrogatory asks for information which could have been answered at some time by consulting documents which are no longer in existence, then in answer to such interrogatory: (a) identify the document; (b) state the time during which such documents were maintained; (c) state the circumstances under which the document ceased to exist; (d) identify all persons who have knowledge or had knowledge of the documents and the contents thereof; and (e) state with particularity Opposer's best recollection of the information contained in the document.

11. If any interrogatory is objected to, or if any document is withheld, under claim of privilege, state, as to each such objection or claim, the following: (a) the privilege or other protection claimed; (b) the basis in fact for the privilege; (c) the type of document; (d) the general subject matter of the document; (e) the date of the document; and (f) the identities of the authors and the recipients, including all persons who received all copies of the document.

12. Your attention is respectfully directed to Federal Rule of Civil Procedure 33(a) which requires the furnishing of "such information as is available to the party". This requires an inquiry of and/or reference to such documents, employees, officers, directors, agents and representatives as may be necessary to enable these interrogatories to be fully and accurately answered.



## **INTERROGATORIES**

1. (omitted)
2. With respect to the allegations made in numbered paragraph 2 of Opposer's Notice of Opposition, that Opposer is engaged in the manufacturing, distribution and sale of soft drinks:
  - (a) Has Opposer manufactured CITY CLUB soda?
  - (b) If Opposer has manufactured CITY CLUB soda, identify each physical site upon which such manufacture occurred, and describe the steps Opposer carried out to manufacture CITY CLUB soda.
  - (c) If Opposer has manufactured CITY CLUB soda, identify the manufacturing process, including without limitation, recipes for the manufacture of CITY CLUB soda, records indicative of the quantity of CITY CLUB soda manufacture in each batch, quality control standards established for CITY CLUB soda, and records reflecting the testing of CITY CLUB soda for quality standards.
  - (d) If Opposer has manufactured CITY CLUB soda, identify:
    - (i) each ingredient used in the manufacture of CITY CLUB soda,
    - (ii) the source(s) from which Opposer obtained each ingredient used in the manufacture of CITY CLUB soda,
    - (iii) all records reflecting the purchase of each ingredient used in the manufacture of CITY CLUB soda.
  - (e) Has Opposer contracted with any third party for the manufacture of CITY CLUB soda?
  - (f) If Opposer has contracted with any third party for the manufacture of CITY CLUB soda, identify:

(i) all third parties with which Opposer has contracted for the manufacture of CITY CLUB soda,

(ii) all contracts for the manufacture of CITY CLUB soda.

3. (omitted)

4. With respect to the allegations made in numbered paragraph 5 of Opposer's Notice of Opposition, that Opposer has acquired valuable good will in the CITY CLUB mark through use in commerce in the United States since at least as early as 2009, identify:

(a) all purchase orders received by Opposer from customers purchasing CITY CLUB soda,

(b) all invoices sent by Opposer to customers purchasing CITY CLUB soda,

(c) all shipping documents for the shipment of CITY CLUB soda to customers, and

(d) all documents reflecting the payment of invoices sent by Opposer to customers purchasing CITY CLUB soda.

5. With respect to the allegations made in numbered paragraph 7 of the Notice of Opposition, identify:

(a) State the information redacted in the "Bill To" and "P.O. Number" fields of each of the invoices reproduced in Exhibit D to the Notice of Opposition.

(b) Identify all documents relating to the sales transactions reflected by the invoices reproduced in Exhibit D to the Notice of Opposition.

6. (omitted)

7. With respect to the allegations made in numbered paragraph 5 of Opposer's Notice of Opposition.

(a) Has Opposer advertised CITY CLUB soda?

(b) If Opposer has advertised CITY CLUB soda:

(1) State the amounts expended on advertising CITY CLUB soda by calendar quarter.

(2) Identify all documents relating to advertising CITY CLUB soda.

8. With respect to Opposer's allegation in numbered paragraph 9 of Opposer's Notice of Opposition, that Opposer reconstructed its business, and recommenced sales of TOP POP soda brand, and recently resumed manufacture of CITY CLUB,

(a) State yearly sales of TOP POP soda by net dollar amount and physical quantity, from 2008 to present.

(b) State year sales of CITY CLUB soda by net dollar amount and physical quantity from 2008 to present.

9. Identify all organizational documents of Opposer.

10. Identify the present supervising employees of Opposer.

11. (omitted)

12. Identify each person who supplied information included in any of the answers to this set of interrogatories and specify the contribution made by each person to the preparation of the answers to these interrogatories.

**DAY'S BEVERAGES, INC.**

June 5, 2015

BY:   
Alex R. Sluzas, Esq.

PAUL & PAUL  
1717 Arch Street  
Suite 3740  
Philadelphia, PA 19103  
(215) 568-4900  
ATTORNEYS FOR APPLICANT

TRADEMARK

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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v.

\_\_\_\_\_  
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Applicant

Appln. No. 86337103

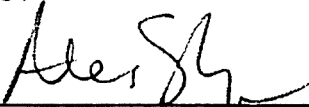
Opposition No. 91220327

**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below true copies of the foregoing  
**APPLICANT'S REVISED FIRST SET OF INTERROGATORIES TO OPPOSER** were  
served by first class mail on Opposer, by attorney, as follows:

Marc P. Misthal, Esq.  
Jonathan M. Purow, Esq.  
Gottlieb, Rackman & Reisman, P.C.  
270 Madison Ave., 8th Floor  
New York, NY 10016-0601

June 5, 2015

  
\_\_\_\_\_  
Alex R. Sluzas, Esq.

# **EXHIBIT D**

**REDACTED**

# EXHIBIT E

HENRY N. PAUL, JR.  
1925-1987  
E. ARTHUR THOMPSON  
1957-1992

JAMES C. MCCONNON  
JOHN F. McNULTY  
ALEX R. SLUZAS  
OURMAZO S. OJAN  
JOHN J. SIMKANICH  
JOHN S. CHILD, JR.

LAW OFFICES OF

## PAUL & PAUL

THREE LOGAN SQUARE  
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SUITE 3740

PHILADELPHIA, PA 19103  
(215) 568-4900

PATENTS, TRADEMARKS, COPYRIGHTS  
AND  
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FAX 215-567-5057  
www.paulandpaul.com  
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Direct dial: 267-765-0172  
asluzas@paulandpaul.com

BY E-MAIL

July 17, 2015

Jonathan M. Purow, Esq.  
Gottlieb, Rackman & Reisman, P.C.  
270 Madison Ave.  
New York, NY 10016-0601

# REMINDER

Sent by E-mail on July 23, 2015  
by Joelle

Re: 3rd Generation Enterprises Co., Corp. v. Day's Beverages, Inc.  
Opposition No. 91220327 (TTAB)  
Paul & Paul File No. 3097

Dear Mr. Purow:

Thank you for your letter dated "May18, 2015" (received yesterday), and enclosed responses to our revised first set of interrogatories.

I ask that you reconsider your objections to our interrogatory No. 8(a). 3rd Generation's sales of TOP POP are highly relevant to the issue of abandonment. If sales of TOP POP were much greater than those of CITY CLUB, this would be evidence that you client intended to discontinue CITY CLUB. Further, if TOP POP was sold in 2013, this would be evidence that Hurricane Sandy is being offered an after-thought excuse for the lack of sales of CITY CLUB in 2013.

I would like to avoid motion practice, but this is an important point, and would likely move to compel a response if you maintain your objection based on relevance.

Regarding the response to Interrogatory 8(b), what were the sales of CITY CLUB in 2008?

Once these issues are resolved, I would like to take a Rule 30(b)(6) deposition of you client. Can you please provide me with dates on which you and your client can be available?

Best regards.

Yours truly,



Alex R. Sluzas

ARS/

# EXHIBIT F



ALLEN I. RUBENSTEIN  
JEFFREY M. KADEN  
TIBERIU WEISZ  
MARIA A. SAVIO  
MARC P. MISTHAL  
BARRY R. LEWIN  
MITCHELL S. FELLER

COUNSEL  
DIANA MULLER\*

\*MEMBER OF THE BAR  
OF ARGENTINA ONLY

GOTTLIEB, RACKMAN & REISMAN, P.C.

COUNSELORS AT LAW

PATENTS · TRADEMARKS · COPYRIGHTS · INTELLECTUAL PROPERTY

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DONNA L. MIRMAN  
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ARIEL S. PEIKES  
JONATHAN M. PUROW  
JASON R. WACHTER  
JONATHAN A. MALKI  
MICHAEL NESHEIWAT

PATENT AGENT  
ZOYA V. CHERNINA

OF COUNSEL  
GEORGE GOTTLIEB  
JAMES REISMAN  
DAVID S. KASHMAN

July 28, 2015

VIA EMAIL

Mr. Alex R. Sluzas  
Law Offices of Paul & Paul  
3 Logan Square  
1717 Arch Street, Suite 3740  
Philadelphia, PA 19103

Re: Opposer's Response to Applicant's Discovery Requests

Dear Mr. Sluzas:

We write in response to your letter dated July 17, 2015.

To address your first point, Opposer stands by its objection to interrogatory No. 8 (a) relating to sales of TOP POP. Applicant has raised the defense that Opposer has abandoned its rights in the CITY CLUB mark, so the question is if Opposer ever ceased to use that mark in commerce for three consecutive years. Opposer has produced documents showing that it did not cease sales of CITY CLUB products, and Applicant has come forward with no evidence to prove otherwise. Opposer has also come forward with documents relating to the damage its business suffered as a result of Hurricane Sandy. Whether Opposer is using Hurricane Sandy as "an after-thought excuse" (and Opposer does not concede this point), is not relevant to this question. In the face of the documents that Opposer has produced, Applicant cannot seriously maintain that Opposer abandoned its rights and, recognizing that, it appears Applicant has embarked on a strategy to make this proceeding as expensive as possible for Opposer. If you intend to pursue a motion to compel, please notify us and we can schedule a meet and confer under Trademark Rule 2.120 (e)(1).

With regards to the sales of CITY CLUB in 2008, our client is procuring this information and we will send it to your attention when we receive it.

As for the 30 (b)(6) deposition, 3<sup>rd</sup> Generation Enterprise Co. Corp.'s Vice President Marlen Bracho and our firm will be available on August 19 and 20.

Finally, Opposer served its first set of discovery requests on Applicant on June 5<sup>th</sup>, and to date it has received no documents from Applicant. Please advise when we can expect Applicant's document production, or if there are no documents to produce, a supplemental response so stating.

Very truly yours,

GOTTLIEB, RACKMAN & REISMAN, P.C.

/s/ Jonathan M. Purow

Jonathan M. Purow

CC: 3<sup>rd</sup> Generation Enterprises Co. Corp.

# **EXHIBIT G**

**REDACTED**